

defendant's defence. The first allegation in this paragraph is a misrepresentation by Mr. A. R. Holden on or about the 10th February, 1930, that he was employing the first defendant for three years certain. This representation, if made, appears to me to be irrelevant as negotiations had only then commenced and no finality was reached until several weeks afterwards. The other misrepresentation alleged is that by Goh Li Seah on the 14th March, 1930. The evidence on this point has already been referred to and the second defendant has not sworn that any such misrepresentation was ever made. I am satisfied, however, that in signing the guarantee the second defendant relied on the representations of his son-in-law, the first defendant, and of his solicitor Mr. Kow Soon Kim. The evidence of the second defendant and of Mr. Kow Soon Kim does not quite agree in various particulars but they both say that Mr. Kow Soon Kim told him that it was stated in the service agreement that it could only be terminated at the end of three years. The second defendant admitted in cross-examination that he was satisfied with any agreement which satisfied the first defendant, and I have little doubt that this statement is correct. In order to succeed, however, the second defendant must show that he acted on the plaintiffs' misrepresentation and in this he has completely failed.

I hold, therefore, that the first defendant has not made out his claim in Suit No. 1148 of 1931 and that he has no defence in Suit No. 79 of 1932 except as to *quantum*.

The second defendant also fails in his defence in Suit No. 79 of 1932 and is liable on his guarantee. There will have to be an enquiry before the Registrar as to the amount due in Suit No. 79 of 1932 and the further consideration of the action must be adjourned with liberty to apply. There will be judgment for the plaintiffs for the sum of \$1,562.77 on their counterclaim in Suit No. 1148 of 1931.

Judgment accordingly.

Solicitors for the Plaintiffs—Allen & Gledhill.

Solicitors for the 1st Defendant—

Claude H. da Silva.

Solicitors for the 2nd Defendant—

John G. Campbell & Co.

[ORIGINAL CIVIL JURISDICTION]

Re M. S. WARD.

[SINGAPORE BANKRUPTCY No. 263 OF 1932.]

Bankruptcy—Small debt—debtor undertaking to pay off by instalments.

In a small case where the debtor has a reasonable prospect of paying off the debt by instalments the Court may in its discretion refuse to make a Receiving Order, —Ordinance No. 44 (*Bankruptcy*) Section 6 (3).

The petitioning creditor was a small money lender and the petition was founded on a District Court Judgment for \$101.55 including costs.

The debtor who was employed as a clerk at Yen 50 per mensem (about \$35 Straits) gave an undertaking to pay \$5 per mensem until the debt was satisfied.

The CHIEF JUSTICE (Sir William Murison) adjourned the petition *sine die* on the special ground that the debt was small and the debtor was able to satisfy it (Section 6(3) Ordinance No. 44 (*Bankruptcy*)).

The petitioning creditor was ordered to pay the Debtor's costs.

Note.—The formal order was drawn up as follows:—

Upon the hearing of the adjourned petition this day and upon reading the affidavit of Bagga Singh sworn to and filed herein on the 7th day of July, 1932, and the affidavit of M. S. Ward sworn to and filed herein on the 22nd day of July, 1932, and upon hearing Counsel for the Petitioning Creditor and for the Debtor It is ordered that the Debtor do pay to the Petitioning Creditor the sum of \$5 per month the 1st payment to be made on the 1st August, 1932, and the subsequent payments to be paid on the 1st day of every succeeding month until the whole of the said sum of \$101.55 shall have been fully paid and satisfied and that the Debtor's costs of these proceedings be taxed and paid by the Petitioning Creditor AND IT IS FURTHER ORDERED that the hearing of this petition be adjourned *sine die* on the special ground that the amount due is small and that Debtor is able to satisfy this debt.

This report was checked and approved by the learned Chief Justice who remarked that the words:

"IT IS ORDERED that the Debtor do pay to the Petitioning Creditor....." were inserted in error.

The Court did not order the Debtor to pay. The formal order should read:

"on the Debtor UNDERTAKING to pay to the Petitioning Creditor....."

[ORIGINAL CIVIL JURISDICTION]

A. R. A. R. M. RAMANATHAN CHETTIAR

vs.

CHUA TIANG SENG AND OTHERS.

[SINGAPORE ORIGINATING SUMMONS No.9 of 1931.]

Equitable Mortgage—Deposit of Deeds—Memorandum of Lien—Registration of Deeds—Parol evidence of deposit—Practice.

The Defendants deposited title deeds relating to land with the Plaintiff subject to an agreement that they should be held as security for monies lent. The

defendants at the same time gave to the Plaintiff a promissory note upon which was written a memorandum that the title deeds were deposited as security. The Memorandum was not and could not be registered under Section 5 of Ordinance 148 (Registration of Deeds) as a Memorandum of Lien or Charge.

Held, that it was proper practice to pray for a declaration in an Originating Summons.

Held further, that an Equitable Mortgagee by deposit of title deeds is entitled to remedy by sale as well as foreclosure.

Held, further following *Kasmerah v. Haji Mohamed Taib* 8 S.S.L.R. 113 and *Ho Hong Bank Limited vs. Chop Hock Chin Leong* 1929 S.S.L.R. 195 that notwithstanding the Memorandum of the Deposit made on the promissory note the effect of the deposit could be proved by parol evidence—*Saminathan vs. Ramasamy*, 8 S.S.L.R. 117 and *Re Mistry*, 8 S.S.L.R. 122 dissented from.

Originating Summons heard in Open Court before Terrell, J.

The arguments of Counsel and facts appear sufficiently from the judgment of Terrell, J. The Defendants did not enter an appearance.

Haydon for the Plaintiff

In the course of argument Terrell, J. intimated to Counsel that he was bound by *Kasmerah's* case being a decision of the Court of Appeal.

Cur. Ad. Vult.
20-4-1931.

TERRELL, J.—This was an application by a mortgagee by deposit of title deeds under Section 71 of the Civil Procedure Code to enforce his security by sale.

The first relief claimed is a declaration that under and by virtue of the deposit the plaintiff is to be considered an equitable mortgagee of the hereditament compound in the title deeds deposited.

I raised the question whether a declaration could be obtained in a proceeding instituted by way of originating summons. It has repeatedly been laid down that the provisions of the corresponding English Rule (LV. r. 5a) are only applicable to simple cases specially referred to in the Rule. It has been held for instance that a personal order for payment cannot be obtained against the mortgagee on originating summons (*Farrer v. Lacy*, 25 Ch.D. 636). Nor can a question of disputed priorities between mortgagees be decided in this way (*re Giles*, 43 Ch.D. 391).

A practitioner accordingly finds himself in this difficulty. If he proceeds by originating summons the relief claimed may be outside the jurisdiction of the Court and the costs of the proceedings will be thrown away. On the other hand if he proceeds by Writ when the relief could have been obtained by originating summons he will be disallowed the extra costs occasioned by his proceeding by writ (*Johnson v. Evans*, 60 Law Times page 29).

After argument I came to the conclusion that in this case the plaintiff was entitled to proceed by originating summons.

To begin with the section 71(1) is available for an equitable mortgagee and there is no doubt that a mortgagee by deposit of title deeds is an equitable mortgagee and that by the nature of his security the first relief for which he must apply is a declaration that he is to be considered a mortgagee.

I also find that in Daniell's Chancery Forms at page 533 in the 6th Edition, Form 1144 commences with a prayer for a declaration of this kind. I am satisfied therefore that under the corresponding English practice it would be in order to ask for the declaration in question.

At one time it was also thought that an equitable mortgagee by deposit could only obtain relief by foreclosure unless there was a written agreement to execute a legal mortgage. It has been held however that Section 25(2) of the Conveyancing Act 1881, which corresponds to Section 30(2) of Ordinance No. 36 (Conveyancing and Law of Property), is sufficiently wide to enable the Court to grant an order for sale to a mortgagee by deposit of deeds (*see Oldham v. Stringer*, 51 Law Times, page 895). It is to be noted that in this case the action was commenced by writ and on default of appearance by the defendant the action was set down as a short cause on motion for judgment. I think therefore that this form of procedure is also open to a mortgagee by deposit enforcing his security.

A greater difficulty arose in connection with a Promissory Note which was given in respect of the loan and which was indorsed as follows:—

"Lot No. 4 and Part 1 of Lot No. 5 of Part A of Grant No. 89. These deeds deposited with the above."

This memorandum was signed by the mortgagees. From the evidence it appeared that the money was lent on the security of the Promissory Note and that the deeds were deposited later in pursuance of the memorandum indorsed. The difficulty arises that under Section 5 of Ordinance 148 (Registration of Deeds) 'assurances' may be registered and unless and until so registered shall not be admissible in any Court as evidence of title to the land to which they relate.

I was referred to the written judgment of Stevens, J. in the Originating Summons 124 of 1929. *The Ho Hong Bank v. Teo Chin Chau*, (1929 S.S.L.R. p. 195). In his judgment Stevens, J. gives cogent reasons for saying that a memorandum of this kind is a memorandum of charge and accordingly is under the definition in the Ordinance as 'assurance.' The question remained whether the 'assurance' was tendered "as evidence of title." On this point I agree with Stevens, J. that the memorandum of deposit is not evidence of title at all. It is merely evidence of his right coupled with the possession of the title deeds to obtain a title by foreclosure or

give a title to a purchaser with the assistance of an Order of Court.

In view however of a decision of the Court of Appeal in Singapore (*Kasmerah v. Haji Mohd. Taib*, 8 S.S. Law Reports, page 113) I consider that the matter is really not open to me to decide and that I must follow that decision. In that case the Court held that it was not a liberty to look at that part of the document which contained the memorandum of charge and held *aliunde* that there was in fact a deposit of title deeds. Thornton J. in *Saminathan v. Ramasamy*, 8 S.S. Law Reports, page 117 and Law J. in *re M. D. Mistry*, 8 S.S. Law Reports, page 122 held the opposite, distinguishing *Kasmerah's* case. I agree with Stevens, J. that these cases are indistinguishable. I hold therefore that I am bound by the Court of Appeal's decision although if the matter were open to me I should decide in the same way but on different grounds.

Where an equitable mortgagee by deposit obtains an order for sale provision must be made for giving the purchaser a good title. A conveyance by the equitable mortgagee even under an Order of Court will only give the purchaser an equitable title, the legal estate being outstanding. A legal mortgagee exercising his power of sale under Ordinance 36 (Conveyancing and Law of Property) is in a different position. By virtue of Section 26(1) of the Ordinance he can convey the property sold for such estate and interest therein as is the subject of the mortgage and as the legal estate is transferred to the mortgagee by a legal mortgage he can convey the legal estate to the purchaser.

It was argued in England under a similar provision of the Conveyancing Act that an equitable mortgagee by deed in exercising his power of sale was able to convey the legal estate, *i.e.* a greater estate than was vested in him by virtue of his equitable mortgage, but it was held in the case of *Re Hodgson & Howe*, 35 Ch.D. page 668 (C.A.) that this was not so and that on such a conveyance the legal estate was left outstanding.

Where an order for sale with the approbation of the Judge is made under Section 1033(2) of the Civil Procedure Code the Court can direct that all proper parties join in the conveyance of the property sold in pursuance of the order. The defendants as mortgagors and entitled to the legal estate will be proper parties and the order should direct that the defendants join in the conveyance to the purchaser. On proof that the defendants are absent or neglect or refuse to execute the deed, application can be made to the Court under Section 570 of the Civil Procedure Code that the Registrar execute the Conveyance and his signature under Order of Court will have the same effect as execution by the

defendants, *i.e.* it will operate to pass all the Defendants' estate. It is not correct that the Court should make an anticipatory order directing the Registrar to convey the Defendants' interest, as the jurisdiction under Section 570 does not arise until a party has been ordered to execute an instrument and has refused or neglected to do so (see *Dart's Vendor and Purchaser*, 8th Edition, page 1005 with reference to the practice under the analogous Rules and Orders in England).

Order accordingly.

Solicitors for the Plaintiff—

Donaldson & Burkinshaw.

[APPELLATE CRIMINAL JURISDICTION]

R. (S. ABDULRAHIMAN) - - Appellant
vs.

K. HAJI MEYDEEN - - Respondent
[SINGAPORE MAGISTRATE'S APPEAL No. 52 OF 1932]

Frivolous complaint—complainant ordered to pay costs—Rigorous Imprisonment in default—Criminal Procedure Code, Sections 432 D, 433.

When an accused person is acquitted in the District Court and the Court considering the prosecution to be vexatious and without reasonable or probable cause orders the prosecutor to pay costs to the accused it may pass a sentence of rigorous imprisonment in default of payment of the Costs.

The appellant instituted a prosecution against the respondent charging him with forgery.

The District Judge (C. Wilson, Esq.) discharged the accused and made the following Order:—

"I consider the prosecution vexatious and without reasonable cause. I give the accused his costs which I tax at \$50 (which Mr. Phillips agrees is reasonable). In lieu of costs one month's rigorous imprisonment."

The appellant appealed against the order directing him to pay costs.

The case was argued on 19th December, 1932 and 14th January, 1933.

Tampoe-Phillips for Appellant. The prosecution cannot be said to be vexatious or without probable cause.

There cannot be a peremptory order for imprisonment in default of payment of costs. If imprisonment can be ordered it can only be simple and not rigorous.

McElwaine, D.P.P. for Crown. Notwithstanding *Tai Kun v. Public Prosecutor of Pahang*, 9 S.S.L.R. Appendix 62 and *Rex v. Tambiappan*, 13 S.S.L.R. 17 imprisonment can be imposed on a complainant who fails to pay costs ordered under Section 432D.